Supreme Court, U.S.
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No. 02-1262

In the

Supreme Court of the United States

AMERICAN RENOVATION AND CONSTRUCTION COMPANY,

Petitioner,

v.

BILL FAVEL, JOHN PITZER, JOE LaMERE TOBY LaMERE and ALVIN BELGARDE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the Davis-Bacon Act preempt state common-law claims for breach of contract, where workers have exhausted all administrative remedies and the employer is estopped to contest its underpayment of wages?

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STATEMENT OF THE CASE

Petitioner American Renovation and Construction Company (ARC) was the general contractor for construction of housing units at Malmstrom Air Force Base in Montana. ARC signed a contract with the U.S. Air Force, agreeing that all workers would be paid prevailing wages under the Davis-Bacon Act.

Respondents are manual laborers who worked for ARC's subcontractors. The work they performed is classified for Davis-Bacon purposes as "iron worker," "carpenter," or other "skilled trade" work. However, the workers all were paid at lower unskilled-laborer rates.

The workers complained about their wages to the subcontractor, and were fired. They complained to ARC without success. Meanwhile, ARC repeatedly represented to the Air Force that all workers were being paid Davis-Bacon rates.

The workers complained to the U.S. Air Force contracting officer. She concurred with their complaint, and sent ARC a tabulation of underpayments, citing Department of Labor (DOL) wage guidelines. ARC did not contest these findings, and acknowledged their validity in subsequent correspondence.

Respondents meanwhile had gone to work for another subcontractor on the project, and were still being underpaid. ARC applied to the DOL to reclassify job descriptions at lower wage rates. The Air Force, in consultation with DOL, refused to grant this request. ARC made no attempt to seek additional review by the DOL.

The workers sued ARC for breach of contract in Montana state district court. The court dismissed their complaint for lack of subject matter jurisdiction. It held that the Davis-Bacon Act creates no private right of action. The court ignored the workers' contention that their claim was at common law, and that the issue was whether the federal Act preempted state common-law claims.

The Montana Supreme Court reversed the district court and reinstated the claim. It held that, under the facts of the present case, the Davis-Bacon Act did not preempt a common-law claim.

The Montana Supreme Court repeatedly emphasized that the workers had exhausted all administrative remedies, and that ARC had not sought any further administrative review. It held, *inter alia:*

> ¶ 31 The Workers took all the proper steps in their attempt to resolve this matter. The first step, complaining to Baer, got them fired. The second step, complaining to ARC, appeared to fall on deaf ears for several months. Finally, the third step, USAF involvement, resulted in a determination by the Contracting Officer authorized to make such a determination, that Baer and ARC were in violation of the Davis-Bacon provisions of their contracts.
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> * * *
>
> ¶ 32 Every decision made by the USAF supported the Workers' claims. From the Workers' perspective, there was no dispute of fact or law as to the proper classification

and wage rate due the Workers. The Air Force calculated that and set it forth in a letter for ARC.

* * *

¶ 33 In sum, neither ARC nor Baer have demonstrated that any further administrative review was either necessary or available to the compiaining Workers under the clear-language of 29 C.F.R. § 5.11. Moreover, they have failed to even argue that such further administrative review would or should have resulted in a different conclusion than that drawn by the USAF Contracting Officer. On these facts, we therefore conclude that ARC and Baer are estopped from arguing that Workers failed to seek administrative review of the dispute. (Pet. App. 17-18 (emphasis added))

ARGUMENT

Petitioner misrepresents the Montana Supreme Court's holding in several respects. It misrepresents the court's analysis to assert a "conflict" with holdings of this Court and of other courts. It also misrepresents the implications of the Montana decision. These points will be explained below.

I. THE PETITION MISCONSTRUES THE MONTANA SUPREME COURT'S ANALYSIS.

ARC's Petition implies repeatedly that the Montana Supreme Court held "that the Davis-Bacon Act provide[s] a

private right of action." (Pet., p. 10; *see also* 12-13, 14-15, 17) On this basis, it alleges a "conflict" between the Montana decision and various cases which have held that there is no such implied private right of action. (*See id.*)

In fact, the Montana court expressly declined to decide whether there is a private right of action under the Act. (*See* Pet. App. 29, ¶ 54) Instead, the court inquired whether the Davis-Bacon Act preempts a state common law action for breach of contract, based on a contractor's promise to pay its workers Davis-Bacon wages.

This is a crucial analytical distinction. Private right of action analysis (as to whether Congress intended to create a right) is governed by the four-factor test of *Cort v. Ash*, 422 U.S. 66 (1975). Preemption analysis (as to whether Congress meant to prohibit common law actions) is governed by quite different considerations. *See, e.g., Medtronic, Inc., v. Lohr*, 518 U.S. 470, 484-486 (1996).

Preemption analysis "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.*, at 485. This presumption in favor of common law actionability has no analogue under *Cort*. Thus, courts can find that Congress left state rights of action intact even though it intended no corresponding federal right of action under a statute.

In the present case, the Montana court painstakingly followed this Court's preemption guidelines. (Pet. App. 19-28, ¶¶ 37-52) It thoroughly scrutinized both the Davis-Bacon Act and its regulations for evidence of preemptive intent. The court concluded that "[u]nder the circumstances presented here . . . a state remedy does not

stand as an obstacle to the accomplishment and execution of the Davis-Bacon Act." (*Id.*, at ¶ 52)

The Montana court's analysis is unimpeachable. The various alarms and remonstrances raised in the Petition have no merit. This will be demonstrated below.

II. THE PETITION MISREPRESENTS THE IMPLICATIONS OF THE MONTANA SUPREME COURT'S ANALYSIS.

ARC's Petition makes several sweeping representations about the impact of the Montana Supreme Court's holding. These representations fly in the face of the Montana court's language and logic. Here are some notable examples:

A. "The decision allows federal laborers to completely side-step the administrative process." (Pet., p. 9) This is a startling assertion, since the Montana court insisted throughout its opinion that workers must comply with the administrative process. Thus, *e.g.*, the Court stressed that "the administrative procedure, when available and not otherwise exhausted, must be routinely pursued to its intended conclusion." (Pet. App. 30, ¶ 56) In the present case, it held that the workers "took all the proper steps" and "exhausted their administrative remedies." (¶¶ 31, 36, 57) It stressed that ARC had failed to show "that any further administrative review was either necessary or available." (¶ 33) There is nothing whatever in the opinion suggesting

that laborers can "side-step the administrative process."

B. **"[S]tate district court judges and juries will decide the complex wage determinations that Congress has declared are within the exclusive jurisdiction of the Department of Labor."** (Pet., p.9) Again, the Montana court emphatically stressed precisely the opposite point. The court repeatedly pointed out that wage determinations were made in this case, in accordance with regulations, by the federal contracting agency in concert with the DOL. (*See* Pet. App. 12-30, ¶¶ 21, 23, 31, 32, 38, 49, 57) For this reason, the court expressly observed, "there are no disputed facts that require the specialized expertise of DOL." (¶ 38) Nothing in the opinion remotely suggests that state judges or juries should make wage determinations that are within the DOL's exclusive control.

C. **"The Montana Supreme Court's decision . . . conflicts with the decisions of at least four circuit courts of appeals . . ."** (Pet., pp. 9-10) Petitioner contends that the Montana court's holding "is in direct conflict with the decisions of the Second, Third, Fifth and Ninth Circuits." (Pet., p. 10) With one exception, however, these cases do not address the issue here. They hold that there is no implied private right of action under

the Davis-Bacon Act[1] - a question which the Montana court expressly declined to consider. (Pet. App. 29, ¶ 54)

The sole federal case in conflict with the Montana court's decision is *Grochowski v. Phoenix Const.*, 318 F.3d 80 (2nd Cir. 2003). *Grochowski*'s 2-1 majority declined to recognize a common-law right of action quite perfunctorily, without any systematic preemption analysis at all. *See id.*, at 84-86. The dissenting judge trenchantly observed that the majority had offered only "a slogan, not an argument." *See id.*, at 90 (Lynch, J., dissenting). He noted:

> The majority fails to cite any actual evidence, in the language or legislative history of the DBA, that Congress intended to prevent state law contract suits based on contractual promises to pay DBA prevailing wages - promises that Congress specifically required to be written into contracts that it must have assumed would be enforceable, like any other contracts, under state law.
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> * * *
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> So what justifies interpreting a remedial statue enacted for the benefit of workers as containing an implicit shadow agenda - not

[1] *See Operating Engineers Health and Welfare Trust Fund v. JWJ Contracting Co.*, 135 F.3d 671, 676 (9th Cir. 1998); *Weber v. Heat Control Co.*, 728 F.2d 599, 600 (3rd Cir. 1984); and *United States v. Capeletti Bros., Inc.*, 621 F.2d 1309, 1317 (5th Cir. 1980).

> reflected in any statutory language or legislative history - to preclude state law causes of action that would enforce contractual promises to comply with federal law?
>
> Because the majority opinion does not provide a sufficient answer, I dissent. *Id.*, at 90-91 (emphasis added)
>
> In sum, there is no judicial consensus for denying common law actions, as ARC suggests in its Petition.[2] The manifest weight of the legal arguments that are marshaled in *Grochowski* support the Montana court's position.

D. **"[T]his Court expressly declined to do what the Montana Supreme Court's decision has done."** (Pet., p. 14) Petitioner contends that the Montana court's holding is in conflict with *Universities Research Ass'n, Inc., v. Coutu*, 450 U.S. 754 (1981). In fact, the Montana court expressly followed *Coutu* in declining to consider whether the Davis-Bacon Act creates a private right of action. (*See* Pet., App. 29, ¶ 54) *Coutu* does not even mention the question at issue in the present case - - whether the Davis-Bacon Act preempts state common-law rights of action.

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[2] The sole state case cited by ARC, *Davis v. Hardaway Contracting Co.*, 386 S.W.2d 707 (Ark. 1965) is highly unanalytic. It seems to deny a right of action on preemption grounds, but cites none of this Court's preemption cases and does not apply its traditional preemption tests. *See Pennsylvania v. Nelson*, 350 U.S. 497, 502-505 (1956) (articulating three-factor test).

III. THE MONTANA SUPREME COURT'S DECISION IS STRICTLY LIMITED AND BASED HEAVILY ON ESTOPPEL.

Besides the considerations above, this case is too narrow to be suitable for this Court's certiorari docket. The Montana Supreme Court stressed that "[t]his decision is limited to the named Petitioners/Appellants . . . we render no ruling as to other potential claimants." (Pet. App., 29, ¶ 55)

Among other matters, the Montana court laid emphasis on estoppel as a dispositive point in the case. It stressed repeatedly that ARC had failed to challenge the USAF/DOL wage ruling underlying the workers' claim. (*See* Pet App., 11-17, ¶¶ 19, 21, 23, 24, 31)

These elements make the case unsuitable as a vehicle for weighing and determining large issues. If this Court wishes to address large questions of federalism in the context of the Davis-Bacon Act, it will certainly be presented with cases more broadly reasoned and less complicated by estoppel issues.

CONCLUSION

The Montana Supreme Court's analysis of the issues in this matter was correct. Its decision, moreover, was narrowly focused and heavily grounded in estoppel. This case is unsuitable for this Court's certiorari docket, and the Petition should be denied.

Respectfully submitted,

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